United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 999

Case No. 1070: COURY ET AL

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Brigitte Stern; Mr. Omer Yousif Bireedo;

Whereas, on 1 March 1999, Jacqueline Coury, Adel El Daly, Peter Neyner, Ferdinand Nostitz-Rieneck, Christa Poiger, Gerhard Roessner, Gerda Schauer and Elfriede Schwang, former staff members of the United Nations Office at Vienna (hereinafter referred to as UNOV), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 July 1999, the Applicants, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"*II. Pleas*

...

(2) Relief Sought

(i) The Applicants request the Tribunal to find that if one or more of their rights or entitlements were unreasonably denied, and if those responsible for these failed to undertake in good faith, an impartial, disinterested attempt to apply the United Nations

Staff [Regulations and Rules], and other applicable policies, that their behaviour [was] not consistent with the Code of Conduct;

(ii) If measures taken by the Respondent were found to be inconsistent with the Code of Conduct, the Tribunal is respectfully requested to make a recommendation to the Secretary-General that the Joint Disciplinary Committee become seized of the issue;

(iii) The Applicants are distressed that given the scale of the measures and steps taken against them the only form of accountability seems to be institutional accountability, that is, that the Respondent, as a corporate entity, alone may be found to have caused the massive distress that resulted from these measures. The Applicants, accordingly, request the Tribunal to seek to find some way by which accountability might also extend to those individuals responsible for the defamation of the good name of the United Nations caused by their actions.

(iv) The Applicants maintain that the Tribunal has determined the invalidity of efforts to coerce staff into the 'voluntary' signing away of their rights and entitlements on sufficiently numerous occasions in the past (...) to provide clear guidance to a reasonably prudent Respondent and, therefore begs that the Respondent be enjoined from designing, producing and inflicting any such policies and practices in the future;

...

(viii) The Applicants request that the Respondent be compelled, in addition, to make payments of three times the outstanding amounts of end-of-service allowance to the Applicants, using UNAT-approved methodology for its calculations, as decided in Inguilizian;

...

(x) That the provision concerning no re-employment with the United Nations for four years following separation be thrown out."

Additionally, the Applicants Coury, Nostitz-Rieneck, Poiger and Schwang requested the Tribunal to find that:

"(v) The Respondent, because of the deliberate, systematic abuse and deprivation of rights and entitlements that the Applicants have had to endure, be ordered to reinstate the Applicants at their grade and step on the dates of separation to be able to serve the Organization for the duration of their permanent appointments, that is, until the normal time of retirement to which they were entitled. The Applicants would also receive full salary, and all benefits and entitlements due from the dates of separation until the dates of reinstatement.

(vi) In the event the [Secretary-General] decides against reinstatement, the Applicants would still receive full salary and all benefits and entitlements from the last days of active service to the dates of normal retirement at age 60.

(vii) In either case, the Applicants request, in addition, two years full salary. Should the Applicants be paid only the amount due them, it would, they contend, constitute a positive incentive for the Respondent to persist with this patently wrongful behaviour.

...

(ix) The Applicants request that the Respondent be compelled, in addition, to make payments to the Applicant Schwang of three times the outstanding service credits calculated to the end of the period of SLWFP [special leave with full pay], including, but not limited to, amounts of end-of-service allowance, using UNAT-approved methodology for its calculations, as decided in Inguilizian, days of vacation or annual leave, and salary increments, if any;

...

(xi) That the Respondent, because of the egregious, deliberate and systematic nature of his acts, be compelled to circulate in the form of an SGB [Secretary-General Bulletin] a description of the policies and practices stemming from this and related cases which were in violation of staff rights and entitlements and an apology therefore."

Additionally, the Applicants El Daly, Neyner, Roessner and Schauer requested the Tribunal to find that:

"(v) The Applicants request that the Respondent be compelled, in addition, to make payments of three times the outstanding amounts of end-of-service allowance to the Applicants, using UNAT-approved methodology for its calculations, as decided in Inguilizian;

...

(vii) Because of the deliberate, systematic, deprivation and defrauding of entitlements that the Applicants have had to endure, the Applicants request, in addition, two years full salary and all benefits and entitlements. Should the Applicants be paid only the amount due them, it would, they contend, constitute a positive financial incentive for the Respondent to persist with this patently wrongful behaviour;"

In addition, the Applicants also requested the Tribunal to find that:

"(i) These cases which have been decided by the Vienna JAB to be non-receivable, are receivable;

(ii) Whether or not the Tribunal agrees with these cases having been joined by the JAB, the Tribunal may consider this application along with the eight individual applications prepared for the JAB in reaching a decision as to receivability;

(iii) For the reasons outlined in the cover letter and below, it may give *expedited* consideration to these applications;

(iv) The Respondent, when silent on the issue of receivability during the administrative review, may not then find an appeal to be not receivable after the appeals are filed. The preliminary responses from the Respondent (...) stated: '... the Secretary-General always reserves the right to raise the issues of receivability and competence, as appropriate.' As these rights, however, were not exercised in the course of the administrative review, the Applicants maintain that they may not be raised later as is the case with appeals by staff.

(v) Since no 'Respondent's Reply' had been received in a timely manner, no 'Respondent's Reply' may be considered by the JAB. Rather, the JAB would be called upon, because of the extensive delays already encountered, and because it enjoys no authority under its present Draft Rules of Procedure and Guidelines to reconsider cases *de novo* or to request comments anew, to proceed immediately to a consideration of the cases before it with those materials in its possession as of the time it took its decision;

(vi) The Applicants, because of the preliminary decisions and because of the presence of most of the cast of characters who took the original decisions being appealed are still in Vienna, may submit the cases to the JAB in New York, or should they so wish, submit the substantive questions to a new JAB panel in Vienna.

(vii) That the JAB foreclosed access to [staff rule] 111.2 (f) as well as the Rules of Procedure and Guidelines of the Joint Appeals Board at Headquarters, III, G, (1) and thereby breached these. For these reasons the Tribunal is respectfully requested to find that the JAB was derelict in its duty."

Whereas the Respondent filed his Answer on 18 January 2001;

Whereas the Applicants filed Written Observations on 22 April 2001 and a further communication on 3 June 2001;

Whereas the facts in the case are as follows:

The Applicant Coury joined the United Nations on 27 October 1969 as a Shorthand Typist at the G-5, step II level. At the time of her separation from service, on 31 August 1996, she was serving as an Editorial Assistant at the G-6, step XI level, in the Research Section of the United Nations Drug Control Programme (UNDCP).

The Applicant El Daly joined the United Nations on 1 March 1968, as a Registry Clerk, at the G-3, step II level. At the time of his separation from service, on 31 December 1996, he served as a Statistical Assistant at the G-6, step XI level, in the Estimates Unit, UNDCP.

The Applicant Neyner joined the United Nations on 16 August 1967 as a Messenger at the M-3, step I level. At the time of this separation on 31 March 1996, he was serving as Senior Documents Control Clerk at the G-5, step XII level, in the Documents Control Unit, UNOV.

The Applicant Nostitz-Rieneck joined the United Nations on 1 August 1968 as a Security Guard at the M-3, step I level. At the time of his separation from service, on 7 June 1996, he was serving as a Telephone Operator at the G-3, step XII level, at UNOV.

The Applicant Poiger joined the United Nations on 31 July 1967 as a Telephone Operator at the M-4, step I level. At the time she separated from service, she served as a Documents Clerk at the G-3, step XII level, in the Interpretation and Meetings Section, UNOV.

The Applicant Roessner joined the United Nations on 19 June 1978 as a Composition Clerk, at the G-5, step IV level. At the time of his separation from service, he was on special leave with full pay from his position as a Composition and Layout Clerk at G-5, step X level, in the Translation and Editorial Service, UNOV.

The Applicant Schauer joined the United Nations on 1 December 1969 as a Library Clerk at the G-4, step IV level. At the time of her separation from service, on 2 August 1997,

she was on special leave with full pay, from her position as a Reference Assistant at G-6 Level XI in the Reference and Terminology Unit, UNOV.

The Applicant Schwang joined the United Nations on 18 August 1969 as an information Clerk at the G-5, step I level. At the time of her separation from service, on 31 March 1997, she was on special leave with full pay from her position as a Public Information Assistant at the G-6, step XI level, in the United Nations Information Service, UNOV.

Each of the Applicants served in Vienna at the time of separation from service, and held permanent appointments, which were terminated under an Early Separation Programme (ESP).

On 18 May 1995, the Under-Secretary-General for Administration and Management circulated an administrative instruction, ST/AI/403, on the subject of the ESP outlining eligibility requirements, compensation package, and other aspects of the programme. On 29 March 1996, he circulated a second administrative instruction, ST/AI/414, which offered a modified ESP, allowing for the possibility of continued contribution to the United Nations Joint Staff Pension Fund. On 3 May 1996, an Addendum to ST/AI/414 was issued providing a similar option for insurance purposes.

The Applicants chose to apply for the ESP and, prior to their separation from service, signed a Memorandum of Understanding (MOU) which set forth the terms and conditions of termination. Each MOU contained the following clause: "... should the Secretary-General decide to terminate my appointment under the provision of Staff Regulation 9.1(a), I will not contest such decision or any decision relating to this termination action". The MOU signed by the Applicant Coury also contained the proviso "provided that staff rules and regulations will be applied correctly".

Additionally, each MOU contained a clause precluding the Applicants from employment with the United Nations, its subsidiary organs and programmes, for a period of four years following separation.

On 28 September 1995, 14 March 1996, and 8 May 1996, respectively, the Applicants El Daly, Neyner and Schauer were notified of the termination of their employment. The other

Applicants were formally so notified on 31 May 1996. The Applicants El Daly and Neyner were separated from the Organization under the ESP pursuant to ST/AI/403; the other Applicants, pursuant to ST/AI/414 and Add.1.

On 19 December 1997, the Applicant Coury requested administrative review of the decision to terminate her appointment under the ESP and claimed, *inter alia*, that she had been "deprived and defrauded of the end-of-service allowance". Similar requests for review were made by the Applicant Nostitz-Rieneck on 19 December 1997; the Applicant Schwang on 20 December 1997; the Applicants El Daly, Neyner, Roessner and Schauer on 20 January 1998; and the Applicant Poiger on 23 March 1998.

The Applicants Schwang, Coury and Nostitz-Rieneck lodged their appeals with the UNOV Joint Appeals Board (JAB) on 19, 20 and 23 March 1998, respectively. The Applicants Neyner and El Daly lodged their appeals with the JAB on 28 and 29 April 1998, respectively; the Applicants Roessner and Schauer on 8 and 11 May 1998, respectively; and, the Applicant Poiger on 5 June 1998.

The JAB adopted its report on 17 December 1998. The proceedings, conclusion and recommendations read, in part, as follows:

> "**E. Proceedings ...**
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> ...
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> 31. ... [I]t decided to join the appeals of [the eight] Appellants ... on the basis that those appeals involve[d] common issues of fact and law. ...
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> 35. ... [T]he Panel met to reconsider the receivability of the Appellants' appeals ... It ... noted that under staff rule 112.f, if an appeal is filed outside the prescribed deadlines, which, on the face of it, would thus not be receivable as is the case with present appeals, it is obligated to examine whether ... there existed exceptional circumstances that prevented the Appellants from filing their appeals within the prescribed deadlines.
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> **F. Conclusion and Recommendations**
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> 37. ... [T]he Panel concluded that there are no exceptional circumstances that justify granting a waiver of the time-limit in the present appeals, it thus unanimously decided that the appeals are not receivable.

38. As the appeals are found not receivable, the Panel has no recommendation to make to the Secretary-General concerning these appeals."

On 8 June 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicants and informed them as follows:

"...

The Secretary-General ... has taken note of the Panel's conclusion that there are no exceptional circumstances that justify granting a waiver of the time-limit in your appeal and of its unanimous decision that your appeal is not receivable. The Secretary-General has therefore decided to take no action on your appeal.

..."

On 19 July 1999, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants' principal contentions are:

1. The Respondent denied the Applicants their full entitlements.

2. The Applicants' rights of due process were violated.

3. The Staff Regulations and Rules were improperly applied.

4. The appeals were not time-barred, due to the existence of "exceptional circumstances" which the JAB ignored.

Whereas the Respondent's principal contentions are:

1. The appeals were time-barred.

2. The Applicants voluntarily accepted the terms of their separation offers and undertook not to contest them. They failed to adduce any evidence that they were obliged or in any other way coerced into accepting those offers. All Applicants' pleas concerning specific terms of their separation entitlements are not receivable.

The Tribunal, having deliberated from 4 to 23 July 2001, now pronounces the following judgement:

I. This is an Application filed jointly by eight former staff members of the United Nations who separated from the service of UNOV under an agreed Early Separation Programme (ESP) in 1995 and 1996.

II. In accordance with the terms of the ESP, the Applicants each signed a MOU which stipulated the terms and conditions of the programme, namely that they could not contest their termination or any decision relating thereto, and that they would be barred from employment with the Organization for four years.

III. In each case, over one year after notification that their employment with UNOV was being terminated, the Applicants requested administrative review of this decision. They subsequently appealed to the JAB claiming that their appeals were not time-barred due to exceptional circumstances, and that their agreed termination was unfair as they had not been fully informed that, in participating in the ESP, they would forfeit their end-of-service allowance. In particular, the MOUs contained no specific statement that this Allowance would be relinquished.

The JAB considered the Applicants' case on 9 November 1998 and concluded that their appeal was not receivable as there were no exceptional circumstances which justified waiver of the time limits.

IV. The Applicants now request that the Tribunal find their application receivable, and undo the terms of their respective MOU, ordering their reinstatement and compensation.

The Applicants contend that a number of exceptional circumstances prevented them from filing an appeal within the subscribed time limits. Primarily, they allege that although each signed a MOU in which they agreed not to contest their termination, the Administration had concealed important information from them. They contend that, had they been properly informed of this information, they would have filed their appeals in a timely manner. The

Applicants rely on Judgement No. 508, *Rosetti* (1991) para XV, wherein the Tribunal held that "acceptance [of a new position with local rather than international status] could not have the effect of depriving the Applicant of the allowances and benefits to which she was entitled under the Staff Rules". In the Applicants' view, this confirms that even if a staff member accepts a condition purporting to deprive them of their rights and entitlements, those rights and entitlements are not so relinquished.

V. It is obvious to the Tribunal that each of the Applicants exceeded the established time limits for requesting review of the impugned decision. The Tribunal finds that the Applicants' undertaking not to contest their agreed termination was unrelated to the possible existence of exceptional circumstances that might justify waiving the time limit for filing an appeal as provided in staff rule 111.2 (f). The very purpose of the Applicants' undertaking was to record their commitment not to appeal the decision, within the established time limits or thereafter.

The Tribunal notes that *Rosetti* can be distinguished from the instant case because the Applicants made a specific commitment not to contest their termination.

Further, the jurisprudence of the Tribunal in similar cases makes it clear that a staff member may not accept an agreed separation package and also file an appeal. (See Judgements No. 547, *McFadden* (1992); No. 573, *Bhatia* (1992); and No. 955, *Al-Jassani* (2000).) In *McFadden*, para. VIII, the Tribunal held that

> "the Applicant could not at the same time, accept benefits under staff regulations 9.1 and 9.3 and institute or maintain an appeal as he has sought to do. If he wished to pursue the latter course he should have refrained from accepting the termination package. He was not at liberty to do both".

In light of the above, the Tribunal agrees with the JAB's conclusion that the appeal was time-barred.

VI. Notwithstanding the finding of the Tribunal that the appeal was time-barred, it notes that while the MOUs signed by the Applicants made no reference to the end-of-service allowance, correspondence between the Applicants and the Organization specifically stated that they would not be entitled to the allowance.

VII. In light of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Brigitte STERN
Member

Omer Yousif BIREEDO
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary